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October 19, 2001

Ms. Magalie Salas, Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

**Re: ET Docket No. 98-153, Revision of Part 15 of the Commission's Rules
Regarding Ultra-Wideband Transmission Systems
*Ex parte Communication***

Dear Ms. Salas:

XtremeSpectrum, Inc. opposes the request of Multispectral Solutions, Inc. (MSSI) for a Further Notice of Proposed Rule Making in this docket.¹ MSSI provides no grounds that support its request.

A. Legal Precedent Does Not Support a Further Notice.

The judicial criteria for a Further Notice are clear and consistent. Further Notice is required only where the rules to be adopted are not a "logical outgrowth" of those proposed² --

¹ Reply Comments of Multispectral Solutions, Inc. at 2 (filed Oct. 9, 2001) (MSSI Reply Comments). XtremeSpectrum, with 67 employees, conducts research in UWB communications systems as its sole business. XtremeSpectrum intends to become a UWB communications manufacturer once the Commission authorizes certification of such systems. XtremeSpectrum takes no position on UWB radar applications.

² *Texas Office of Public Utility Counsel v. FCC*, No. 00-60434 slip op. at 30 (5th Cir. Sept. 10, 2001) ("[I]f, after notice and comment, the agency alters the proposed rule, a new comment period will not be required so long as the modified rule is a 'logical outgrowth of the published proceedings.'"); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (second round of comment not required where final rule is "logical outgrowth" of proposed rule).

i.e., where the original Notice did not give adequate opportunity to comment on the final rule.³ The courts have never required that the final rule be identical to that proposed. To the contrary, notice-and-comment rulemaking expects the agency to modify its proposals in response to reasonable comment.⁴ Without that flexibility, the agency would either have to ignore incoming comment, or use it only to restart the rulemaking from the beginning.⁵ The first option would defeat the purpose of public input, while the second would make it all but impossible ever to adopt rules in a fast-changing technological environment.

All of the proposals under active consideration here were expressly raised in the Notice. Any of them -- or any combination -- qualifies as a logical outgrowth of the Notice. MSSI's request for a Further Notice has no legal basis.

B. Nothing in MSSI's Factual Arguments Supports a Further Notice.

None of the factual points raised by MSSI justifies a Further Notice. None even bears on the legal criteria for a Further Notice.

First, MSSI notes that Government and military UWB devices are not subject to Commission regulation, and that the Government has expressed concern about interference from improperly regulated commercial UWB devices.⁶ The Government's exemption from Part 15 regulation argues neither for nor against a Further Notice, but is simply irrelevant. And, while the Government's interference concerns have been a major focus of this proceeding, the technical proposals in the docket respond fully to those concerns, and are well within the scope of the original Notice.

Second, MSSI acknowledges that several public safety organizations have requested prompt action in the docket. MSSI also asserts those organizations can be served, at least in part, through outstanding manufacturing waivers.⁷ Perhaps MSSI mentions the waivers to imply that

³ *National Exchange Carrier Association, Inc. v. FCC*, 253 F.3d 1, 8 (2001), *citing Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1299 (2000) (other citations omitted). *See also The Fertilizer Institute v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

⁴ 5 U.S.C. Sec. 553.

⁵ *National Cable Television Ass'n v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984) ("An agency, after all, must be free to adopt a final rule not described exactly in the [notice of proposed rulemaking] where the difference is sufficiently minor, or agencies could not change a rule in response to valid comments without beginning the rulemaking anew.")

⁶ MSSI Reply Comments at 1.

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delay caused by a Further Notice would not harm public safety operations. But MSSI does not show, or even assert, that the existing waivers can meet the Nation's diverse and expanding public safety needs through the extra time that additional notice and comment would require -- typically a year or more. And MSSI completely overlooks the economically much more important market for UWB-equipped consumer devices, which is not served by waivers. The two markets, moreover, are closely related. Although public safety agencies need UWB, they cannot fund its continuing development on their own. Public safety users, like all others, will benefit from the low cost and high performance resulting from the extensive engineering and plant investments that only consumer applications can support.

Finally, MSSI charges the Commission with failing to appreciate the complexity of UWB and its possible impact on existing spectrum users.⁸ That allegation is surprising. MSSI's was the 725th submission in an exceptionally vigorous proceeding that has now run more than three years. Beyond the Commission's NOI and NPRM, and the extensive comments and replies filed in response to each, the docket also includes seven full-scale technical studies, all of which again have been subject to public notice, comment, and replies, and a spirited exchange of views through the *ex parte* process. This enormous effort is almost single-mindedly devoted to educating the Commission on precisely those issues that MSSI hints the Commission has overlooked: the complexity of UWB and the protection of other spectrum users. The present record gives the Commission all of the data it needs for an informed decision, with no need for a Further Notice.

CONCLUSION

This is not the first time MSSI has requested regulatory action that, if granted, would hinder its competitors. MSSI previously demanded technical limits that would have favored MSSI over other manufacturers, although MSSI provided no technical support for those limits.⁹ (XtremeSpectrum, in contrast, has always advocated technical rules that give manufacturers the greatest freedom to innovate and compete, consistent with protecting other users.) Now, MSSI urges a Further Notice that would delay other manufacturers' reaching the market, again without showing why the delay is necessary. Such a delay would have less impact on MSSI itself, which sells UWB devices to the Government without any need for Commission Rules, but would severely disadvantage MSSI's competition for commercial UWB devices.

Because MSSI's request for a Further Notice has no basis in law or in fact, but would serve mainly to impede MSSI's competitors, we urge the Commission to disregard the request.

⁸ MSSI Reply Comments at 2.

⁹ Reply Comments of Multispectral Solutions, Inc. at 1 (filed July 20, 2001) (requesting emissions limited to above 5.46 GHz). In other filings, MSSI has also requested emissions above 5.46 GHz as an alternative to 3.1 GHz (filed Aug. 7, 2001), and a sharp cut-off at 3.1 GHz (filed Aug. 31, 2001).

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, I am electronically filing this written *ex parte* communication for inclusion in the above-referenced docket.

If there are any questions about this filing, please call me at the number above.

Respectfully submitted,

Mitchell Lazarus
Counsel for XtremeSpectrum, Inc.

cc: (by email and electronic filing)
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